In the High Court of Punjab and Haryana, at Chandigarh.

1. **R.S.A. No.2528 of 1989**

Date of Decision: 28.11.2007

Karam Singh (deceased) through his Legal heirs

…Appellant

Versus

Jaswant Singh and Others

…Respondents

AND

2. **E.S.A. No.2529 of 1989**

Karam Singh (deceased) through his Legal heirs

…Appellant

Versus

Jaswant Singh and Others

…Respondents

CORAM: HON'BLE MR.JUSTICE RAJESH BINDAL

Present: Mr. Jagmohan Singh Chowdhary, Senior Advocate
with Mr. Surinder S. Grewal, Advocate
for the appellants.

Mr. Rahul Dhanotia, Advocate
for the respondents.

RAJESH BINDAL, J.

This order of mine shall dispose of a R.SA. No. 2528 of 1989 and E.S.A. No. 2529 of 1989 as common issues are involved therein. The appellants/defendants are in appeal before this Court against the judgment and decree of the Courts below, whereby suit filed by the respondents No.1 to 4 for declaration to the effect that they are owners in possession of the property in dispute in their own right, was decreed and further the appellants/defendants were restrained from dispossessing the respondents/plaintiffs in any manner in execution of the decree passed by learned Sub Judge Ist Class, Nabha on May 27, 1983 in Suit No.1184 of July 21, 1982 titled as "Karam Singh v. Jangir Kaur.

At the time of hearing, learned senior counsel for the appellant sought to argue the appeal raising the following substantial questions of law:-

i) Whether a fresh suit is maintainable after the earlier suit claiming the same relief was dismissed for non-prosecution?

ii) Whether a decree conferring rights on a person for the first time would require registration to confer any right on him?

The facts of the case in dispute have been noticed from R.S.A. No. 2528 of 1989. 72 kanals of land was owned by Jangir Kaur , mother of respondents No.1 to 4/plaintiffs. There is nothing on record to suggest as to whether the property owned by Jangir Kaur was her self acquired property or inherited property. Out of total land, she suffered a consent decree in favour of respondents No.1 to 4/plaintiffs for land measuring 17 bighas on October 5, 1977. There is no averment in the suit filed by the respondents No.1 to 4/plaintiffs to the effect that there was any family settlement on the basis of which the decree was suffered by her. The decree which created rights in favour of respondents No.1 to 4/plaintiffs was not got registered by them. The same was not given effect to even in the revenue record as mutation was not entered in favour of the respondents No.1 to 4/plaintiffs. The respondents No.1 to 4/plaintiffs were shown in the revenue records in possession of the land only as tenants.

On March 16, 1982 Jangir Kaur entered into an agreement to sell the same land, which formed part of the decree dated October 5, 1977. On

her failure to execute the sale deed, the appellant filed suit for specific performance on July 21, 1982, which was decreed on May 27, 1983 and even the appeal filed against the same was also dismissed. In execution of the judgment & decree on November 17, 1983, learned Executing Court got the sale deed executed in favour of the appellant after rejecting the objections filed by Jangir Kaur and the respondents No.1 to 4/plaintiffs. Thereafter, the present respondents No.1 to 4/plaintiffs filed a suit for declaration and injunction on June 3, 1985 seeking declaration to the effect that they are owners of the land in dispute and the appellants/defendants be restrained from dispossessing them from the land in dispute. The claim made in the suit was on the basis of the earlier decree in their favour i.e. Dated October 5, 1977. The suit was contested by the appellants/defendants raising the plea that Jangir Kaur, mother of respondents No.1 to 4/plaintiffs, being owner of the land in dispute entered into an agreement to sell the land in dispute to the appellant and on her failure the suit for specific performance filed by the appellant was decreed by learned trial Court on October 14, 1987 against which the appeal was also dismissed. It is further submitted that objections filed by the respondents No.1 to 4/plaintiffs under Order 21 Rule 58 CPC in the execution filed by the appellant were dismissed on November 23, 1983 and objections under Order 21 rule 97 CPC were dismissed on February 2, 1985 by the learned Executing Court.

Still further it is submitted that an earlier suit filed by the respondents No.1 to 4/plaintiffs on June 3, 1985 claiming the same relief was dismissed for non-prosecution on June 18, 1985. Accordingly, the present suit filed by the respondents No.1 to 4/plaintiffs was not maintainable being barred under Section 11CPC and Order 2 Rule 2 CPC. On the pleadings of the parties, the following issues were framed:-

(i) Whether the suit is not maintainable in the present form? OPD

(ii) Whether the suit is barred u/s 11 CPC and u/o 2 R 2 CPC? OPD

(iii) Whether the plaintiffs are in exclusive possession of the suit land as owners? OPP

(iv) Whether the plaintiffs are entitled to the injunction prayed for? OPP

(v) Relief.

Learned trial Court decided the suit in favour of the respondents No.1 to 4/plaintiffs holding therein that they are owners of the suit property and restoration of their possession was ordered. In execution, the objections filed by the respondents No.1 to 4 under Order 21 Rule 99/101 CPC in the in the earlier decree suffered by Jangir Kaur on May 72, 1983 were also dismissed. In appeal filed by the appellant before the learned First Appellate Court, an additional issue was framed to the following effect:-

> 1-A. Whether the alleged decree and judgment tentamounts to the transfer of land of the value of more than Rs. 100/- which required stamp and registration as such and is not covered by any registered deed and if the decree required registration but was not got registered, if it is void on that amount conferring no title on Jaswant Singh etc.? Onus on Karam Singh.

Learned lower Appellate Court while upholding the findings of learned trial Court on the issues already framed even decided the additional issue regarding requirement of registration of the consent decree against the appellant relying upon the judgment of this Court in ***Gurdev Kaur and Others v. Mehar Singh and others 1989 PLJ 182***. It is in this factual matrix that the appeal is before this Court.

Heard learned counsel for the parties and with their assistance perused the record.

As already referred to above, learned senior counsel for the appellants sought to raise two substantial questions of law in the present appeal. The first issue is regarding the maintainability of the second suit in view of the fact that the earlier suit filed by the respondents No.1 to 4/plaintiffs was dismissed for non-prosecution. He referred to document Ex.D1, copy of the plaint filed by the respondents No.1 to 4/plaintiffs in the earlier Suit No. 597 dated November 25, 1983, the prayer made in the above referred suit is extracted below:-

> "It is, therefore, prayed that a decree for declaration to the effect that the plaintiffs are the exclusive owners and in possession of land measuring 72 Bighas 11 Biswas comprising in Khewat No. 3, Khatauni No. 7, Khasra Nos. 339 (0-5), 346 (6-5), 344 (6-5), 350 (6-5), 351 (6-5), 352 (5-13), 354 (5-8), 356 (5-

> 13), 361 (6-17), 362 (6-18), 363 (6-17), 364 (4-6), 470 (0-1), 353 (5-12), according to jamabandi for the year 1974-75 and the defendant No. 2 Jangir Kaur has no right or concern with this land and as such this land is exempted from attachment or sale in execution, decree passed in Civil Suit No.1184 against Smt. Jangir Kaur defendant No.2 in favour of defendant No.1, be passed in favour of the plaintiffs against the defendants with costs and a decree for permanent injunction restraining the defendant No.1 from getting the suit land attached and sold in execution of decree dated 21.7.1982 be also passed in favour of the plaintiffs against the defendants with costs".

Ex.D2 is the document referred to by learned senior counsel, which is a certified copy of the statement made by learned counsel for the respondents No.1 to 4/plaintiffs in the above noted suit and also the order passed by the Court therein, which are to the following effect:-

> "Statement of Sh. S.S.Verma, Advocate for plaintiff.
>
> Stated that I have no instructions from the plaintiff to pursue the suit. The suit may be disposed of."

Ex.D3 is another document referred to is a certified copy of the order passed by the Court in the above referred suit on the basis of the statement of learned counsel for the respondents No.1 to 4/plaintiffs therein. In view of the above referred statement made by him on March 18, 1985, the order was passed, which is as under:-

> "18.3.1985 Present:- Counsel for the parties.
>
> Sh. S.S. Verma, learned counsel for the plaintiff has reported that no instructions on behalf of the plaintiffs. None of the plaintiff has come present in person. It appears that the plaintiffs are no more interested in prosecuting this suit. Hence, the suit is hereby dismissed for non prosecution. File be consigned".

To substantiate his plea, learned senior counsel for the appellants referred to the plaint filed by respondents No.1 to 4/plaintiffs in the present suit and especially the prayer made therein, which is in the following terms:

> "it is, therefore, prayed that suit of the plaintiffs may kindly be decreed with costs and it may be declared that the plaintiffs are exclusive owners in possession in their own rights independently of agricultural land measuring 72 Bighas 11 Biswas situated at village Ramgarh, Tehsil Nabha bearing according to Jamabandi 1974-75 Khewat No.3, Khatauni No.7, Khasra Nos. 339 (0-5), 346 (6-5), 344 (6-5), 350 (6-5), 351 (6-5), 352 (5-13), 354 (5-8), 356 (5-13), 361 (6-17), 362 (6-18), 363 (6-17), 364 (4-6), 470 (0-1), 353 (5-12), and that the defendants have no right, title, interest or concern with the above land or any part of it. The defendants have no right to dispossess the plaintiffs from the suit land or any part of it in any manner or in execution of decree passed by S.J.I.C. Nabha Dt. 27.5.1983 in Suit No.1184 of 21.7.1982 entitled Karam Singh Vs. Jangir Kaur and a permanent injunction may also be issued against the defendants directing them not to dispossess the plaintiffs from the suit land mentioned above or any part thereof in any manner or in execution of the judgment and decree dated 27.5.1983 passed by S.J.I.C. Nabha in Suit No.1184 Dt. 21.7.1982".

Referring to and relying upon the above documents, where the earlier suit was dismissed for non-prosecution, the submission is that the fresh suit was barred as in terms of provisions of Order 9 Rule 9 CPC, the respondents No.1 to 4/plaintiffs were precluded from filing a fresh suit in respect of the same cause of action and claiming the same relief. Reliance has been placed upon the following judgments:-

a) ***Gurbax Singh v. Bhooralal AIR 1964 Supreme Court 1810;***

(b) ***M/s Bengal Waterproof Ltd. v. M/s Bombay Waterproof Manufacturing Company and another AIR 1997 Supreme Court 1398;***

(c) ***Jai Narain v. Smt. Sona Devi 2006 (2) Civil Court Cases 99 (P&H);*** And

(d) ***K.K.Puri (deceased) represented by LRs v. Smt. Krishna Puri and others Recent Civil Reports 638 (P&H)***

In response to these arguments raised by learned senior counsel for the appellants, learned counsel for the respondents submitted that the principles of res judicata are not applicable in the present case as the issues raised in the earlier suit were not decided on merits as the same was merely dismissed for non-prosecution. He further submitted that the plea regarding bar in terms of Order 9 Rule 9 CPC was not raised by the appellants before the learned Courts below, hence, cannot be raised for the first time before this Court. Reliance has been placed on judgment of Hon'ble the Supreme Court in ***Joseph Pothen v. The State of Kerala AIR 1965 Supreme Court 1514.***

In response to the plea of learned counsel for the respondents as to non-raising of the issue of the suit being barred in terms of provisions of Order 9 Rule 9 CPC, learned senior counsel for the appellants submitted that the same being a legal issue and the entire evidence of the parties being already on record and the suit having been contested with full knowledge of the issue regarding maintainability of the suit, the same can very well be raised before this Court as well.

To appreciate the contentions of the parties on this question, a reference to provisions of Order 9 Rule 9 CPC would be relevant, which are as under:-

“Decree against plaintiff by default bars fresh suit

(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an Order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his non appearance when the suit was called on for hearing, the court shall make an Order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No Order shall be made under this rule unless notice of

the application has been served on the opposite party".

A plain reading of above referred provision clearly shows that wherever a suit is wholly or partly dismissed under Order 9 Rule 8 CPC, the plaintiff is precluded from bringing a fresh suit in respect of the same cause of action. The only remedy given to him is for moving an application for setting aside the dismissal order. In the present case, perusal of the proceedings in the earlier suit filed by the respondents No.1 to 4/plaintiffs show that the same was dismissed for non-prosecution for the reason that the counsel representing the respondents No.1 to 4/plaintiffs therein pleaded no instructions in the absence of respondents No.1 to 4/plaintiffs. In terms of provisions of Order 9 Rule 9 CPC, the only remedy available to the respondents No.1 to 4/plaintiffs was to file an application for setting aside the ex-parte order and a fresh suit could not be filed. The law on the issue being plain and categoric, no two opinions are possible and accordingly the above referred question No.1 is answered in favour of the appellants while holding that the present suit filed by the respondents No.1 to 4/plaintiffs was barred in terms of Order 9 Rule 9 CPC.

In view of my answer to the first question, wherein it was held that the suit filed by the respondents No.1 to 4/plaintiffs was not maintainable, no further discussion is required on the second question, which is left open.

For the reasons mentioned above, the present appeal is accepted, the suit filed by respondents No.1 to 4/plaintiffs is dismissed with costs.

(Rajesh Bindal)
Judge

November 28, 2007
"DK"

(Refer to reporter)